Supreme Court, U. S.
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No. 80-68

In the Supreme Court of the United States

OCTOBER TERM, 1980

KITTY LOUISE STROUSE and LORI GAY WINTER, by and through her natural mother and next friend, KITTY LOUISE STROUSE,
Petitioners,

VERSUS

GLENN DALE CARTER, Associate Judge of the District Court of Pottawatomie County, Oklahoma,
Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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October, 1980

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The Respondent respectfully moves the Court to deny the Writ of Certiorari to review the judgment and order of the Supreme Court of Oklahoma entered on the 5th day of May, 1980, but not effective or filed until the 10th day of June, 1980, which appears as Appendix "A" to the Petition for Writ of Certiorari. (The true party in interest is Bette Winter.)

JURISDICTION

Petitioners attempt to invoke jurisdiction under 28 U.S.C. § 1257(3). In refusing or granting jurisdiction, the Court should consider Part V of the Rules of the Supreme Court, Rule 19. Rule 19 provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

STATUTORY PROVISIONS INVOLVED

Title 12 Oklahoma Statutes § 223, which provides:

> "An executor, administrator, guardian trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way. R.L.1910, § 4683."

STATEMENT OF THE CASE

The Respondent, Bette Winter, specifically denies those allegations contained in the statement of the case presented by Petitioners, wherein they state that Bette Winter is unfit, "to have custody of the child." There has been absolutely no evidence tending to show that Bette Winter is unfit in any manner whatsoever. Bette Winter has not had an opportunity to visit with the minor child over the four (4) years that the child has resided with Kitty Louise Strouse. Absolutely no visitation privileges were extended to her whatsoever.

The statement of the case of Petitioners would lead one to believe that the minor child was legally in the custody of Kitty Louise Strouse when in truth and fact the minor child is now residing with Kitty Louise Strouse in direct violation of a court order of the District Court of Pottawatomie County, Oklahoma (Appendix A attached herein, Transcript of Ruling).

Kitty Louise Strouse has the minor child as the direct result of a ruling of the trial court which was in error. It seems unconscionable that one would acquire some sort of an interest as a "Foster Parent" or otherwise as the result of an erroneous ruling.

The minor child became a named party in this matter only on the Petition for Certiorari to the United States Supreme Court. Up until that time, the minor child had not been named as a party.

This case has previously appeared before the United States Supreme Court, and at that time a Petition for Writ of Certiorari was denied. It was denied under case number 78-1443 on May 14, 1979.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

One of the real parties in interest throughout this matter has been Lori Gay Winter. Title 12 O.S., § 223 provides as follows:

> "An executor, administrator, guardian trustee of an express trust, a person with whom, or in whose name, a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit is prosecuted. Officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way. R.L.1910, § 4683."

By reason of the foregoing statute, the child has been a party throughout these proceedings, said proceedings having been brought on her behalf. The case of *Stevens* v. *Kelly,* 134 P.2d 56 (Dist. Ct. App. Calif. 1943), construed a similar California Statute, § 369 of the Code of Civil Procedure. Therefore, she has not been denied due process.

Petitioner attempts to convince the Court that Kitty Louise Strouse has become a foster parent. It is submitted that Kitty Louise Strouse has absolutely no standing in this matter whatsoever. The adoption decree entered in the State of Oklahoma is valid and binding and Kitty Louise Strouse has absolutely no interest in the minor child.

Kitty Louise Strouse is further without standing to raise any legal issues in respect to Lori Gay Winter.

To grant certiorari at this time and allow Kitty Louise Strouse to litigate the best interest of Lori Gay Winter would upset adoptions and totally destroy the integrity of any and all adoptions which have occurred. Natural par-

ents could come forth and contend that they are a better fit parent than the adoptive parent and that the best interest of the minor child is always best served with a natural parent. The net effect of granting certiorari in this case would be to destroy many family units or provide for the method with which that family unit can be destroyed.

There are agencies in Oklahoma that utilize foster parents on a temporary basis; sometimes that time period being quite extensive for the care of minor children. To now say that a hearing on best interest must be conducted prior to that agency reacquiring those minor children from a foster parent is akin to adoption by passage of time. This is precisely what Kitty Louise Strouse would now have the Supreme Court of the United States do.

Petitioner would lead the Court to think that she has been denied due process and equal protection by the denial of a hearing on the best interest issue.

None of the cases cited in Petitioners' Petition for Certiorari are applicable to this case in that all the cases cited by Petitioners pertain to divorce or full faith in credit or other matters not related to adoptions. The legal relationships in the cases cited by Petitioners are extremely different from the legal relationships in this particular case. Further, the Oklahoma Statute, 30 OKLA. STAT. § 11, as cited by Petitioners, relates to marriage and divorce, not adoptions. That statute is found in the title of marriages whereas the statutes pertaining to adoptions are found in Title 10.

The changing of the legal relationships of the parties must be recognized when determining whether or not a state permits a child to choose with whom that child shall

live and the same relationship must be considered when applying the due process or equal protection concept. In other words, when one considers the relationship of the parties, it is apparent that no substantial federal question has been raised by Petitioner; that Petitioner has no standing to raise the best interest issue or a federal question.

The Oklahoma Supreme Court's orders are not arbitrary when the relationship of the parties are considered.

There is absolutely no evidence that Kitty Louise Strouse is serving the best interest of the minor child or that Bette Winter would fail to serve the best interest of the minor child; neither of which is a federal question.

CONCLUSION

Kitty Louise Strouse has the minor child as a result of a court ruling later overturned. She should not be allowed to litigate "best interest" based on passage of time gained as a result of a void court order.

When the legal relationships of the parties are considered, neither Kitty Louise Strouse nor Lori Gay Winter have been denied equal protection or due process.

The Writ should be denied.

Respectfully submitted,

ALBERT W. MURRY
3801 Classen Blvd., Suite 200
Oklahoma City, Oklahoma 73118
Tel. (405) 528-3132

Counsel of Record for Respondent

October, 1980

CERTIFICATE OF SERVICE

I certify that on this ..... day of October, 1980, three (3) copies of the Brief in Opposition to the Writ of Certiorari were mailed postage fully prepaid, to Paul McKinney, 9 East 9th, Shawnee, Oklahoma 74801 and Harold E. Flaigle, 936 N. Waco, Wichita, Kansas, co-counsel for Petitioners.

I further certify that all parties required to be served have been served.

Albert W. Murry

APPENDIX A

IN THE DISTRICT COURT OF THE TWENTY-THIRD JUDICIAL DISTRICT SITTING WITHIN AND FOR POTTAWATOMIE COUNTY STATE OF OKLAHOMA

In the Matter of the Adoption)
) No. JFA-71-29
of LORI GAY WINTER.)

— — — — — — — — —

TRANSCRIPT
of

Proceedings had in the above entitled and numbered cause on the 11th day of September, 1980, in District Courtroom No. 2 of the Pottawatomie County Courthouse, Shawnee, Oklahoma.

— — — — — — — — —

BEFORE: THE HONORABLE GLENN DALE CARTER
Associate District Judge

FOR
BETTE J. WINTER: ALBERT W. MURRY
Attorney at Law
3801 Classen, Suite 200
Oklahoma City, Oklahoma 73118

FOR
KITTY LOUISE STROUSE
AND
ROBERT D. WINTER: PAUL McKINNEY
Attorney at Law
9 East 9th Street
Shawnee, Oklahoma 74801

* * * *

THE COURT: In JFA-71-29, you may show the Movant appears in person —

MR. MURRY: Yes, Your Honor.

THE COURT: — and by Al Murry.
And the Respondent —

MR. McKINNEY: Kitty Louise Strouse by Paul McKinney.

THE COURT: Okay. Now, this was the time that she was to have delivered the child —

MR. McKINNEY: Yes, sir.

THE COURT: — over. Okay. Is the child here?

MR. McKINNEY: If the Court please, I have an announcement to make. I received a telephone call this morning from Mr. Harold Fleggal, an attorney in Wichita, Kansas, who is Mrs. Strouse's attorney in Kansas. He asked me to make the announcement to the Court that upon advice of counsel Kitty Louise Strouse respectively declines to deliver Lori Gay Winter.

THE COURT: Okay. Well, of course, you're the attorney in the case here, as far as I'm concerned.

MR. McKINNEY: That's right.

THE COURT: We'll not be relying on advice of somebody in Kansas somewhere. All right. She — she has declined, so that means that you're entitled to bring your contempt proceeding and your motion to —

MR. MURRY: Move first to forfeit the bond. Order payment forthwith. Secondly, we'd ask the Court to issue a citation, set a date certain for hearing, and we'll prepare the pleadings.

THE COURT: Okay. You file your application for citation, and I'll certainly set it for hearing. I don't think there's any question you're entitled to be heard on that. And you file your application for an order directing her — an order ot forfeit the bond and for payment to be made, and I'll entertain that.

MR. MURRY: Okay. In other words, you won't do it today.

THE COURT: No.

MR. MURRY: What I wanted to do today, Your Honor, if we could, just pick a date for my citation to be heard.

THE COURT: Okay. All right. And your motion, also.

MR. MURRY: Yes, Your Honor. That will be fine.

THE COURT: Okay. One o'clock on September the 30th. One o'clock p.m.

MR. McKINNEY: I presume we will be served with copies of applications and orders?

THE COURT: Yes, sir. Do you want to acknowledge receipt — I mean, do you want to acknowledge — or to accept service on behalf of your client now?

MR. McKINNEY: No, Your Honor.

MR. MURRY: And, Your Honor, at this time we would ask Counsel to furnish us with an address in the State of Kansas of which his client resides.

THE COURT: Well, this may be a matter over which there's sufficient continuing jurisdiction of the Court that service on counsel — it wouldn't on contempt. That would require —

All right. Are you prepared to provide that?

MR. McKINNEY: I don't have it with me, Your Honor.

THE COURT: All right. You know —

MR. McKINNEY: I don't mind furnishing the address.

THE COURT: Okay. Can you provide it within twenty-four hours?

MR. McKINNEY: Yes.

MR. MURRY: Would the Court order him to accept service?

THE COURT: I don't think — No, I don't think I can on — I know I can't on contempt.

MR. MURRY: All right, Your Honor.

THE COURT: It's just like accepting him — ordering him to accept service of a warrant. Not many lawyers want to go to jail on behalf of their client.

MR. MURRY: Right. Don't blame them for that, Your Honor.

THE COURT: The — but I am ordering that within twenty-four hours — or I'm simply picking up on his agreement, to provide you the address within twenty-four hours.

MR. MURRY: At this time we'd like to advise the Court that in four years my client has not disobeyed any order out of this Court. We have timely and properly complied with each and every order issued by the Court, by the Supreme Court of the State of Oklahoma on numerous occasions and those orders, if any, out of the United States Supreme Court. And we want that in the record that we have done that.

THE COURT: Well, I understand — I understand your view. I think the thing that's before us is that she has declined to appear. You've been granted leave, and I have fixed a tentative date for the hearing of your motion and your contempt citation.

MR. MURRY: Yes, Your Honor.

THE COURT: I have directed that — And I assume that's to be a telephone call to your office to advise you of the address of the Petitioners, Lori Gay Winter, in the original proceeding.

MR. McKINNEY: And if you'll call me before you leave town, I'll give it to you over the telephone today.

THE COURT: Okay.

MR. MURRY: At this time we'd like to order a transcript of the proceedings which have transpired here today.

THE COURT: All right. That's really between you and the reporter.

MR. MURRY: I understand. Just put it in the record and it's there, Your Honor.

THE COURT: All right. Okay. Anything further before I recess this matter?

MR. MURRY: No, Your Honor.

THE COURT: All right.

MR. McKINNEY: No, Your Honor.

THE COURT: All right. Very well. This cause stand in recess.

(Thereupon, the proceedings were completed at 1:09 p.m.)

[Reporter's Certificate omitted in printing]